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Global Food Trade in a Rule Based System: An Indian Perspective

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Abstract

A rule-based regime of international trade is built upon norms of equality and non-discrimination. It helps maintain equity in international trade by the observance of principles such as that of Most Favoured Nation and National Treatment. A closer inspection of the sector wise international trade practices of nations suggests that there are deviations from the rule-based mechanism of World Trade Organisation. This detrimentally impacts the balance of trade. This research article analyses the application of the rule-based regime of the World Trade Organisation with special reference to instances of inequalities in regulations imposed on trade in food products in the context of India and other developing countries. The paper concludes with an analysis of the plausible reasons for the rejection of exports from developing countries and suggests the need for the rectification of such inequalities.

Keywords: Equity, Most Favoured Nation, National Treatment, Non-Discrimination, General Agreement on Tariffs and Trade

1. Introduction: Developing Countries' Engagement with General Agreement on Tariffs and Trade and the World Trade Organisation

The participation of developing countries within the framework of the General Agreement on Tariffs and Trade (GATT) has been lower than that of developed nations since its formation. During the time

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of formation of GATT 1947, Asian and African nations were in the process of reconstructing their polity and economy, post the colonial rampage. Before the Uruguay rounds of negotiation, the functioning of the GATT was based upon the policy of major traders negotiating with principal suppliers. Since developing nations were neither major traders nor principal suppliers of commodities, they were excluded from world trade deliberations.¹ The GATT was founded with twenty-three contracting parties,² of which only ten were developing nations and the remaining thirteen signatories were developed economies.³

From the 1960s, the GATT witnessed a substantial increase in terms of participation of developing nations. By the end of 1991, there were one hundred and two members in the GATT, of which seventy-nine were developing nations.⁴ Mechanisms such as Special and Differential Treatment (S&DT), Generalized System of Preferences (GSP) (Under this system, developed countries offer non-reciprocal preferential treatment to products originating in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes), etc. were brought into force, whereby developing nations were given preferential treatment, thereby encouraging their participation. Though this offered a smooth entry into world trade, embedded protectionist tendencies manifested through political forces persisted. For instance, in the Tokyo Round, the United States and the European Communities insisted that they would not give the benefits of the newly drafted Codes, which contained S&DT provisions, to the developing countries unless they agreed to adhere to the GATT obligations once they turned richer. This stance of the leadership of the developed countries⁵ created political pressure to accede to the Codes. Similarly, though the GSP was put into practice

¹ Sheila Page, *Developing Countries in GATT/WTO Negotiations*, OVERSEAS DEVELOPMENT INSTITUTE 12 (February 2002).

² *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

³ Robert E. Hudec, *GATT and the Developing Countries*, COLUM. BUS. L. REV. 67, 71 (1992).

⁴ *Id.*

⁵ Hudec, *supra* note. 3.

from 1970s, developed countries were not inclined to lift restrictions on most competitive products.⁶

Amidst these happenings, developing countries, including India, maintained trade barriers with a view to protect their economy and nascent industries.⁷ However, debt crises, pressure from international lending systems and economic stagnation led many developing countries to slash their trade barriers and open up their economies, with the goal of liberalization.⁸ The Uruguay Round of negotiations appeared promising to developing countries, as it focused on sectors such as textiles, agriculture, etc. The Uruguay rounds culminated in the formation of the World Trade Organization (WTO). GATT, 1947 was replaced by GATT 1994, it being one of the sub-agreements to WTO.⁹

While discussing the engagement of third world nations with the WTO, it is crucial to ascertain the trading predicament of the economically weak nations. Even after twenty-five years of its formation, African engagement in global trade is a meagre 2%.¹⁰ "Total trade from Africa to the rest of the world averaged \$760,463 million in current prices in the period 2015 - 2017, compared with \$481,081 million from Oceania, \$4,109,131 million from Europe, \$5,139,649 million from America and \$6,801,474 million from Asia."¹¹ African nations are thus not yet completely aligned with the requisite economic transformation that is vital for enhancing prospects of global trade.¹² Their existing economic pattern needs

⁶ *Id.* at 71-74.

⁷ See, P.N. ROY, A DICTIONARY OF ECONOMICS (2003).

⁸ Hudec, *supra* note 3.

⁹ GATT 1947 and GATT 1994: What's the Difference? https://www.wto.org/english/docs_e/legal_e/legalexplgatt1947_e.htm

¹⁰ Chemutai V., Low. P, *African Perspectives on Trade and the WTO*, 5(6) GREAT INSIGHTS (2017) <https://ecdpm.org/great-insights/shifts-trade-development/african-perspectives-trade-wto/>.

¹¹ *Made in Africa – Rules of Origin for Enhanced Intra-African Trade*, ECONOMIC DEVELOPMENT IN AFRICA 2019 UNCTAD REPORT, 19, https://unctad.org/system/files/official-document/edar2019_en_ch1.pdf.

¹² *Id.*

reformulation, as a majority of African nations impose substantial tariff barriers in intra-regional trade, contrary to the WTO norms.¹³ It is opined that Africa needs deeper integration that goes beyond just preferential tariff liberalization.¹⁴

Fragile democracies, weak governance,¹⁵ expenses incurred for getting a matter adjudicated by the Dispute Settlement Body of WTO,¹⁶ etc. are factors that contribute to decreased third world engagement within the WTO framework. While legalisation decreases uncertainty, it imposes additional costs through increased complexity of procedures, making it difficult to avail benefits from the system.¹⁷ Developed countries, therefore, are more likely to use WTO's dispute settlement mechanism to their advantage, than the developing countries.¹⁸

History of the GATT and the WTO reveals that their dispute settlement mechanism have been optimally used by developed countries. In a study conducted in 2008, of the 380 cases that were considered by the WTO, only 18% of the complaints were brought for consideration before the WTO by developing countries. It was found that developed countries, that constitute a minority of the

¹³ See, Jodie Keane, Massimiliano Calì & Jane Kennan, *Impediments to Intra-Regional Trade in Sub-Saharan Africa*, OVERSEAS DEVELOPMENT INSTITUTE, (2010), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7482.pdf>.

¹⁴ See, Joan Apecu, *The Level of African Engagement at the World Trade Organisation from 1995 to 2010*, <https://journals.openedition.org/poldev/1492>

¹⁵ *Id.*

¹⁶ Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* EUROPEAN UNIVERSITY INSTITUTE WORKING PAPERS, 10 (2017), https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf.

¹⁷ Moonhawk Kim, *Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures*, 52(3) INT. STUD. Q., 657 (2008).

¹⁸ *Id.*

WTO members, had initiated around 80% of the cases.¹⁹ Most developing countries do not have access to a high level of legal expertise and other human and technical resources, thereby increasing the cost of making use of the dispute settlement system.²⁰ Gregory Shaffer attributes this to constraints of legal knowledge, financial endowment, political power ... or simply law, money and politics.²¹ In the context of the Uruguay Rounds, Nelson Mandela had pointed out that “the developing countries were not able to ensure that the rules accommodated their realities... it was mainly the preoccupations and problems of the advanced industrial economies that shaped the agreement.”²² Further, uniformly applied rules are not necessarily fair owing to the differing circumstances of the members.²³

At the same time, it is important to note that many nations that are economically stronger are keen on retaining their ‘developing nation’ tag. This is because developing countries are entitled to S&DT under the WTO regime which helps them secure (i) longer time periods for implementing international agreements and commitments (ii) increased trading opportunities and (iii) the advantage of provisions requiring the WTO members to safeguard their trade interests, etc.²⁴ Advanced economies like Qatar, Saudi

¹⁹ Kristine Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, (2014) <https://studentorgs.kentlaw.iit.edu/jicl/wp-content/uploads/sites/5/2014/01/BohlSubmissionWTOFinal.pdf>.

²⁰ Aileen Kwa, *WTO and Developing Countries*, INSTITUTE FOR POLICY STUDIES, (November 1, 1998), https://fpif.org/wto_and_developing_countries/.

²¹ Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177, 177 (2006).

²² *South Africa: Statement by H.E. Mr. Nelson Mandela, President*, GENEVA WTO MINISTERIAL 1998: STATEMENT, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/mandela_e.htm.

²³ Kwa, *supra* note 18.

²⁴ Tojo Jose, *What is Special and Differential Treatment (S&DT) under WTO?*, INDIAN ECONOMY (May 16, 2019) <https://www.indianeconomy.net/splclassroom/what-is-special-and-differential-treatment-sdt-under-wto/>.

Arabia, Hong Kong, South Korea, etc. still consider themselves as developing nations.²⁵ Developed States such as the United States and the European Union are of the opinion that countries such as India, China and South Africa must no longer fall under the 'developing nation' tag.²⁶ Brazil's forgoing of the developing nation status, though welcomed by developed nations, has set the ball rolling regarding the right of developing countries to S&DT provisions.²⁷

Despite the passage of two decades since the formation of the WTO, the successful integration of developing countries within the trading fabric cannot be conclusively determined. Instability of national economies, infrastructural hardships, lack of expertise, procedural formalities of trade, oversized populations, etc. hinder attaining sufficient progress in trade and securing optimum representation before WTO.

1.2 Scheme of Research

The WTO, constituted upon the edifice of the GATT, focuses on liberalising trade through better market access, affordability of better standards of living and the economic development of nations across the globe. The six featured objectives of the WTO are (i) to set and enforce rules for international trade, (ii) to provide a forum for negotiating and monitoring further trade liberalization, (iii) to resolve trade disputes, (iv) to increase transparency of decision-making processes, (v) to cooperate with other major international economic institutions involved in global economic management, and (vi) to help developing countries benefit fully from the global trading system.²⁸

²⁵ *Id.*

²⁶ *Id.*

²⁷ Huma Siddiqui, *Friction between India and Brazil, Following Disagreement at WTO*, FINANCIAL EXPRESS, (July 30, 2019, 7:05 p.m.) <https://www.financialexpress.com/economy/friction-between-india-and-brazil-following-disagreement-at-wto/1661000/>.

²⁸ Kym Anderson, *World Trade Organisation*, ENCYCLOPAEDIA BRITANNICA, (July 20, 1998) <https://www.britannica.com/topic/World-Trade-Organization>.

This research examines the objective of the WTO to ensure that developing countries benefit from global trade in association with its objective to set up and enforce rules of international trade that encapsulates the ideal of WTO as far as developing nations are concerned. The article discusses equity as practiced in international trade and its practical manifestations. The author evaluates the rule-based mechanism of the WTO with special reference to India in the context of food and agricultural sector, vis-à-vis sanitary and phytosanitary measures.

2. Equity in Trade and Rule Based Mechanism of WTO

The one-line connotation given to any trading arrangement is that let 'trade be free and fair.'²⁹ While freedom of trade is dependent upon success of diplomacy and politics, fairness/equity of trade is largely premised upon adherence to a legal scheme. Freedom of trade without fairness can have far-reaching consequences. The history of third world countries is an account of incidents where fairness in trade was overpowered by the military might and technological advancements of the colonizers.³⁰ Therefore, what is being sought for is a better guarantee for trade performance in accordance with fairness principles. This section focusses on the legal system of WTO in order to understand equity in trade.

Terms such as 'equity,' 'non arbitrariness,' etc. are the equivalents of fairness in international law scholarship. They are embedded in doctrines of public international law such as the Calvo clause (which entails equality of treatment to foreign entities/nationals)³¹, principle of non-refoulement (according to which, no one shall be made to return to a country where they may face danger, inhuman or degrading treatment on account of reasons such as violation of

²⁹ *Laissez Faire*, the French term meaning *Let Alone*; indicating abstention from interference with free markets.

³⁰ Ryan Matthew Womack, *The Emergence of Liberalism and Free Trade in the Developing World*, April 28, 2006 at 9.

³¹ See, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV), UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, [https:// unctad.org/ system/ files/ official-document/ psiteiitd11v4.en.pdf](https://unctad.org/system/files/official-document/psiteiitd11v4.en.pdf).

law, ethnicity, etc.),³² etc. Nonetheless, the persuasive nature of international law provides space for dissensions. For instance, despite receiving stern international criticism for its refusal to grant entry to North Korean refugees based on principle of non-refoulement, the Chinese political stance on the matter has remained unchanged.³³

The rule-based system of international trade has to be ascertained against the backdrop of the implementation mechanisms available under the WTO regime. For example, referring a case to the International Court of Justice (ICJ) or the Dispute Settlement Body of the WTO makes their findings binding upon the parties. Even after a matter is referred to dispute settlement mechanisms, many a times countries withdraw the case based upon consensus, with the hope that the subject of consensus will prevail.³⁴ However, when countries resort to pacific methods of dispute settlement such as negotiation or mediation, its implementation is solely based upon the political will of the parties.³⁵ The WTO, coupled with its Dispute Settlement Understanding offers mechanisms to effectuate an equitable/rule-based regime. 'Whether these mechanisms serve their purpose' is the fundamental premise of this research. 'Are these mechanisms beneficial to developing countries?' forms the second query.

Kofi Annan once expressed, "We cannot take the onward march of free trade and rule of law for granted. Instead, we must resolve to underpin the free global market with genuinely global values and

³² Convention Relating to Status of Refugees, art.3, Jul. 28, 1951, 189 UNTS 137.

³³ Roberta Cohen, *China's Repatriation of North Korean Refugees*, BROOKINGS, (March 5, 2012), <https://www.brookings.edu/testimonies/chinas-repatriation-of-north-korean-refugees/>.

³⁴ WTO DSU art. 3.7 states that "A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".

³⁵ Abdulla Mohamed Hamza, Miomir Todorovic, *Peaceful Settlement of Disputes*, 6(1) G.J.C.M.P. 11, 16 (2017).

secure it with effective institutions.”³⁶ Rule of law in trade/ rule-based regime of trade is understood in the context of parameters of human rights, democracy, legal regulatory efficiency, transparency and the like.³⁷ Friedrich Hayek construed the rule of law as the ‘heart of development policy’³⁸ and E.P. Thomson, the Marxist historian, referred to it as an ‘unqualified human good’³⁹ According to Neil Mac Cormick, rule of law is

stance in legal politics according to which matters of legal regulation or controversy ought to, as far as possible, be conducted in accordance with predetermined rules of considerable generality and clarity in which legal relations comprise rights, duties, powers and immunities, clearly defined by reference to such rules, and in which acts of the government however desirable, teleologically must be subordinated to respect for such rules and rights.⁴⁰

Absence of a rule-based regime can lead to discrimination and in turn oppression. Cordell Hull regarded discrimination as the handmaiden for armed aggression.⁴¹ His undersecretary, Sumner Welles, voiced that “one of the surest safeguards against war is the opportunity of all peoples to buy and sell on equal terms.”⁴² In the specific context of the WTO texts, rule of law in trade is directly

³⁶ THE ROLE OF THE WORLD TRADE ORGANISATION IN GLOBAL GOVERNANCE, 27, (Gary P. Sampson ed., 2001).

³⁷ Junsok Yang, *The Effect of International Trade on Rule of Law*, 17(1) J. EAST ASIAN ECON. INTEGR., 27, 33 (2013).

³⁸ Simon Chesterman, *An International Rule of Law?* 56(2) AM. J. COMP. LAW, 331, 332 (2008); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 220-33 (1960).

³⁹ Daniel H. Cole, “*An Unqualified Human Good*”: E.P. Thompson and the Rule of Law, 28 J.L. & SOC’Y, 177 (2001).

⁴⁰ Neil Mac Cormick, *Reconstruction After Deconstruction: A Response to CLS*, 10(4) OXF. J. LEG. STUD., 539, 541 (1990).

⁴¹ RICHARD N GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (1980); Nicholas Di Mascio & Joost Pauwelyn, *Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102(1) A.J.I.L., 48, 60 (2008).

⁴² *Id.*

connected to principles of equality and non-discrimination as envisaged under Most Favoured Nation treatment and National Treatment as both norms quintessentially convey these principles.

Discrimination not only upsets the rule-based regime of international trade, but also causes distrust among trading partners. When discrimination is sought through tariff and non-tariff measures, it imposes costs on foreign trading partners. It does not bring an economic advantage to importing nations either, as such measures are often imposed in pursuance of a hideous agenda. This causes deadweight losses to the economy.⁴³ Trade disruption caused due to the imposition of non-tariff measures by a trading partner is countered by other trading nations taking similar methods. This leads to manipulation in trade such as citing a third country with respect to rules of origin,⁴⁴ over- production of goods resulting in dumping,⁴⁵ purposeful devaluation of currency⁴⁶ etc.

2.1 The Dual Principles of Most Favoured Nation and National Treatment

The rule-based regime of international trade is reflected in Article I and III of the GATT Agreement. Article I is the Most Favoured Nation (MFN) principle and Article III deals with National Treatment (NT). These dual principles are embedded in other fundamental texts of the WTO such as General Agreement on Trade

⁴³ Alan Sykes, *Regulatory Protectionism and Law of International Trade*, 66 U.CHI. L.REV. 1, 10-13 (1999); Nicholas Di Mascio and Joost Pauwelyn, *Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin*, 102(1) A.J.I.L, 48, 60 (2008).

⁴⁴ See, *Government Frames Norms for Enforcement of Rules of Origin for Imports under FTAs*, THE ECONOMIC TIMES (August 23, 2020).

⁴⁵ *US China Trade Spat could Lead to Dumping of Chinese Goods in Emerging Markets: India Ratings*, THE ECONOMIC TIMES,

⁴⁶ Jeffry S Beckington, Mathew R. Amon, *Competitive Currency Depreciation: The Need for a More Effective International Legal Regime*, J. INT'L BUS. & L., Vol. 10, Issue. 2 (2011).

in Services (GATS)⁴⁷ and Trade Related Intellectual Property Rights (TRIPS).⁴⁸

The MFN and NT principles are the means by which the pivotal policies of equality and non-discrimination under the WTO regime are upheld. MFN mandates that goods imported by foreign countries be treated equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners; accordingly, if one country is granted a special favour (such as a lower customs duty rate for one of their products), it must be made available to all.⁴⁹ MFN makes it obligatory for countries to afford no better treatment to similar products from different countries.

While the MFN ensures equal treatment for similar goods at the borders, the NT focusses upon like treatment behind the borders. NT is founded on the principle of treating foreign and domestic goods equally.⁵⁰ Premised upon tolerance to imports and domestic products of like nature, it offers competition between rivalling goods by mandating their like treatment under international trade law. NT principles are more impactful as its efficacy is tested upon national policies and regulations, which form the subject of contentious disputes before the WTO. The principle of NT is founded upon two objectives. (i) ensuring that nations do not circumvent their tariff reduction commitments by enacting discriminatory taxes or internal laws against those items that have complied with customs regulations of a particular country ⁵¹ and (ii) avoidance of

⁴⁷ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), art. II and art. XVII.

⁴⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), art. IV and art. III.

⁴⁹ *Principles of the Trading System (Understanding the Basics)*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

⁵⁰ *Id.*

⁵¹ Report of the Panel, *Italian Discrimination Against Imported Agricultural Machinery*, GATT BISD 7S/60 (Oct. 23, 1958); Nicholas Di Mascio and

protectionism in the application of internal taxes and regulatory measures.⁵² The second objective is broader in nature as protectionism can be practiced in various forms. Legitimate exceptions to MFN and NT norms are permissible under the WTO system.

MFN and NT principles are often discussed in the context of disputes questioning trade restrictive measures adopted by countries against each other. Majority of the discussions revolve around NT rather than on MFN. While analysing a complaint brought before it, GATT/ WTO panels determine whether the importing country has overtly/ implicitly discriminated between two like products (of which one is domestically manufactured). This interpretation grew more intrusive over the years through analysis of observable characteristics of goods such as their physical similarities, competitiveness, substitutability of the products, criteria used in tariff classification etc.⁵³

The *Japan-Alcoholic Beverages* case is one that dealt extensively with the application of the principle of national treatment.⁵⁴ The complainants in the case, namely, European Communities, Canada and United States claimed that spirits exported to Japan were discriminated against, since Japan imposes substantially lower tariff on its exotic drink *sochu* when compared to whisky, cognac and white spirits.⁵⁵ The WTO Panel found that the Japanese Liquor Tax law was violative of Article III.2 of GATT, against which Japan preferred an appeal before the Appellate Body. The Appellate Body

Joost Pauwelyn, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102(1) A.J.I.L., 48, 60 (2008).

⁵² GATT 1994, art. 3.

⁵³ See, Robert E. Hudec, "Like Product": The Differences in Meaning in GATT Articles I and III, in *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW*, 101-123 (Thomas Cottier et al. eds., 2000).

⁵⁴ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (adopted on December 24, 1996).

⁵⁵ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (adopted on December 24, 1996).

held that members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments which they have made in the WTO Agreement. The Appellate Body affirmed the panel's conclusion though it stated that errors have come in the legal reasoning provided by the panel. An internal tax measure needs determination on two counts (i) whether the imported and domestic products are taxed alike (ii) whether the taxes applied to imported products are in excess of that applied to like products. The Appellate Body also confirmed three issues with regard to which NT has to be determined. They are (i) whether imported and domestic products are directly competitive or substitutable products; (ii) whether the directly competitive or substitutable imported and domestic products are similarly taxed; and (iii) whether dissimilar taxation of the directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production.⁵⁶ These factors have a bearing on determining protectionism vis-à-vis national treatment, regardless of the sector of study.

3. Trade Restrictive Measures vis-à-vis Developing Nations

Studies indicate that despite the progressive implementation of equality norms, nations are devising new methods to pursue protectionism. The two decades since the formation of the WTO has witnessed an upsurge in trade restrictive measures. These include both tariff and non-tariff barriers. Director General of WTO, Robert Azevedo, in the context of the accentuation of trade barriers between October 2018 and May 2019 stated that, "the message of the report before us is very serious. These actions have real economic effects...It is essential that we tackle the tensions that are leading to higher trade barriers, greater uncertainty and lower trade growth."⁵⁷

⁵⁶ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (adopted on December 24, 1996).

⁵⁷ *Trade Restrictive Measures Continue at Historically High Level*, WORLD TRADE ORGANIZATION, (July 22, 2019) [https:// www.wto.org/ english/news_e/news19_e/trdev_22jul19_e.htm](https://www.wto.org/english/news_e/news19_e/trdev_22jul19_e.htm).

The trade policy review with respect to the abovementioned period, placed trade covered by import restrictive measures at USD 339.5 billion, with the imposition of thirty-eight import restrictive measures including tariff increases, import bans, special safeguards, import taxes and export duties. The same period also witnessed the implementation of forty-seven new measures aimed at trade facilitation, with almost seven new measures adopted every month. It also needs to be noted that trade restrictive measures recorded during this period was regarded the lowest average since 2012.⁵⁸ The report also indicates that a majority of these measures have been imposed by G20 nations comprising developed and dominant developing countries like India.

Reasons for the spike in trade restrictive measures may vary. They include the need to protect domestic manufacturers, safeguards against dumping, ensuring public health and safety, etc. The explanations provided to justify the imposition of such restrictions are often superficial; the underlying purpose being to defeat healthy competition between like products. However, such exercises may not be advantageous at all times. For example, in the case of Mexico which levied punitive tariffs of 1,105% on Chinese footwear⁵⁹ as anti-dumping duty, through a superficial examination of injury to the domestic market and the non-market economy treatment afforded to China.⁶⁰ The Mexican measures resulted in an unprecedented diversion of exports to Mexico by China; as a consequence of which, trade went from USD 400 million in 1993 to USD 30,000 million in 2007.⁶¹ This is an example of how the rule-based regime wanes in the midst of economic strategies.

Deterrence to trade is the antithesis to the equality and non-discrimination principles, unless they fall within valid exceptions under the WTO framework. Nations tend to justify import restrictions under the guise of protecting public health, morals,

⁵⁸ *Id.*

⁵⁹ YUEFEN LI, *USES AND MISUSES OF ANTI-DUMPING PROVISIONS IN WORLD TRADE: A CROSS COUNTRY PERSPECTIVE*, 69, 87 (Bibek Debroy & Debashis Chakraborty eds., 2006).

⁶⁰ *Id.*

⁶¹ *Id.*

preserving environment, preventing untoward practices in trade, etc.⁶² While they are legitimate exceptions to GATT and its sub-agreements, closer inspection of individual situations prove that, at times, these exceptions are relied upon to pursue the protectionist policies of governments. The non-discrimination philosophy of the WTO needs to be examined in the context of practical realities for a better analysis of the situation. This examination is conducted with reference to restrictions imposed on food exports from India under the Agreement on Sanitary and Phyto-sanitary Measures.

3.1 Global Food Exports

The Agreement on Sanitary and Phyto-sanitary Measures (SPS Agreement) sets out the basic rules of food safety and allows countries to set their own standards to the extent requisite for the protection of human, plant and animal life and health.⁶³ The SPS Agreement permits countries to impose measures to protect plant, animal and human life and health in a manner that is not arbitrary or unjustifiably discriminatory between countries where identical or similar conditions prevail. Risk assessment with respect to imports should be based on scientific justification backed by scientific evidence.⁶⁴ The adequate level of SPS protection, is one that is not more trade restrictive than necessary with due regard to economic and technical feasibility.⁶⁵ Wherever international standards exist, harmonization shall be based upon widely accepted yardsticks such as Codex Alimentarius Commission,⁶⁶ International Office of

⁶² GATT 1994, art. XX(b).

⁶³ *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm#:~:text=protecting%20domestic%20products%3F-The%20Agreement%20on%20the%20Application%20of%20Sanitary%20and%20Phytosanitary%20Measures,to%20set%20their%20own%20standards.&text=They%20should%20be%20applied%20only,or%20plant%20life%20or%20health.

⁶⁴ Agreement on Sanitary and Phyto-sanitary Measures (SPSA), art. 5.2.

⁶⁵ *Id.*, art. 3.3.

⁶⁶ The Commission lays down international standards w.r.t food safety.

Epizootics (OIE),⁶⁷ International Plant Protection Convention,⁶⁸ etc. Members to the WTO are at liberty to maintain higher levels of protection than the current international standards, if there is scientific justification or the same is deemed appropriate by the member based on Article 5 of the Agreement. Members are encouraged to enter into equivalence agreements (Article 3), provide requisite technical assistance to developing countries (Article 9) and also to provide special and differential treatment to them (Article 10).⁶⁹

The European Union,⁷⁰ United States⁷¹, etc. have their own stringent regimes of food safety, higher than what is maintained by Codex. The prominent food safety standards relate to maximum residue levels, hygiene in food processing units, cases of infestations, etc. Research shows, with regard to pesticide residue levels, Codex accounts for around 2,500 maximum residue levels, whereas the EU has over 22,000, the United States over 8,600, Japan has over 9,000 whereas China in comparison has only 484.⁷² This divide, to a large extent, is attributable to the policies of the respective nations with regard to implementation of food safety norms.

A study conducted on the reasons for differing food safety and quality standards in countries of the European Union, Mercosur (the Spanish acronym of Mercado Común del Sur. It is a political and

⁶⁷ Organisation that deals with animal disease control. It therefore has ramifications with regard to food safety and sanitary safety

⁶⁸ Protecting sustainable agriculture and enhancing global food security through prevention of pest spread is one of the objectives of IPCC.

⁶⁹ SPSA, *supra* note.64.

⁷⁰ Arpita Mukherjee *et.al.*, *SPS Barriers to India's Agricultural Exports: Learning from the EU Experiences in SPS and Food Safety Standards*, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS (ICRIER).

⁷¹ In the United States for instance, food safety standards are determined by the Federal Drugs Administration (FDA), which lays down strict rules for imports

⁷² Fengxia Dong & Helen H. Jensen, *Challenges for China's Agricultural Exports: Compliance with Sanitary and Phytosanitary Measures*, 22(1) CHOICES (2007) <https://www.choicesmagazine.org/2007-1/foodchains/2007-1-04.htm>.

economic bloc comprising Argentina, Brazil, Paraguay, Uruguay and Venezuela) and African Caribbean Pacific (ACP) Regions explains that the difference in priority maintained by countries is a reason for differences in the application of food safety standards. EU countries generally practice Good Agricultural Practices (GAP) and Good Health Practices (GHP).⁷³ Mercosur nations are export oriented economies and therefore practice GAP/ GHP or like practices to a very large extent, whereas only very few firms among ACP countries practice GAP/GHP standards. While the EU regions emphasize on consumer-related topics such as traceability and labelling systems,⁷⁴ unequal income divisions in Mercosur nations drive people to emphasize more on home markets. Governments and producers of Mercosur nations are becoming more aware of food safety and quality regulations. ACP countries are still discovering the need for food quality and safe food. Governments play a major role in developing countries by providing necessary infrastructure, better facilities for transportation and storage in order to conform with the international food safety standards.⁷⁵ These nations also need better support from WHO and Food and Agriculture Organisation (FAO) in the form of technical assistance. Better food safety management can improve international competitiveness and quality of life globally.

3.2 Instances of Discrimination in Global Food Trade with respect to India

While most food safety directives are oriented at ensuring the availability of safe food, this is not the case in all situations. Due to the reduction in import tariffs and commitments based on principles such as S&DT, afforded to developing countries, high income countries increasingly make use of quality standards as formidable barriers to trade.⁷⁶ For instance, despite being the largest milk

⁷³ Suharni Rahmat, Chew Boon Cheong, Mohd Syaiful Rizal Bin Abd Hamid, *Challenges of Developing Countries in Complying Quality and Enhancing Standards in Food Industries*, 224 *PROCEDIA - SOCIAL AND BEHAVIOURAL SCIENCES* 445 – 451, 449, 450 (2016).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See, Mukherjee et.al., supra note. 70.*

producer in the world, India is unable to export milk products to the EU.⁷⁷ Issues raised by the EU against entry of Indian dairy products include lack of traceability of products to farms of origin, high risk status of India as regards foot and mouth disease, issues related to milk product quality controls, residues monitoring controls, hygiene in producing centres, milking hygiene, presence of chemicals in some of the cattle feed posing a threat to the milk quality, etc.⁷⁸ The EU raised these issues despite export certification being mandatory in the Indian dairy sector, along with the condition that exports will take place only from the materials processed in an approved units that implementing food safety management systems.⁷⁹ Despite being made in accordance with Food Safety Management System Based Certification,⁸⁰ Indian dairy products are not accepted by the EU. India has grown to become a strong competitor to the EU in milk production and this can be one of the overt reasons for EU's stance in this regard.⁸¹ It is quite ironical that the EU seeks to import milk products to India without reciprocating the same.⁸²

Another instance of discrimination is with regard to Indian mangoes. Studies indicate that mangoes from Pakistan are 3.5 times more prone to pest infestations when compared to mangoes from India.⁸³ However, in 2014, a complete ban was imposed on import of Indian mangoes, whereas no such ban was imposed on products from Pakistan.⁸⁴ Similar measures should have been imposed

⁷⁷ *Id.*

⁷⁸ *Id* at 93-95.

⁷⁹ Shashi Sareen, *Food Export Control and Certification*, FOOD AND AGRICULTURE ORGANIZATION, [http:// www.fao.org /3/ y5871e/ y5871e0m.htm](http://www.fao.org /3/ y5871e/ y5871e0m.htm).

⁸⁰ Kasturi Das, *Coping with SPS Challenges in India: WTO and Beyond*, 11(4) J.I. E. L., 971, 981 (2008).

⁸¹ Jagdish Kumar, *India:126% Growth in Dairy Exports*, DAIRY GLOBAL, (October 3, 2019), <https://www.dairyglobal.net/Market-trends/Articles/2019/10/India-126-growth-in-dairy-exports-480318E/>.

⁸² Sohini Das, *Amul Cautions Commerce Ministry on Proposed EU – India FTA*, BUSINESS STANDARD, (March 26, 2013, 16:39), https://www.business-standard.com/article/companies/amul-cautions-commerce-ministry-on-proposed-eu-india-fta-113032600266_1.html.

⁸³ Mukherjee et.al., *supra* note. 70.

⁸⁴ Mukherjee, *supra* note 56, at 40.

against the Dominican Republic and Kenya where similar conditions of fruit flies' infestations exist, however, they were not visited with the same regulations as India was.⁸⁵ This is a sign of the non-transparent nature of the regime of the EU and is a violation of its WTO obligations.⁸⁶

Yet another case is one dealing with discrimination against Indian tea exports. Trade levels of major tea exporting countries like India and China are often reduced on account of high pesticide residue levels. For example, Germany had alleged high residue levels of ethion in Darjeeling tea; and high levels of bicofols in Assam, Terai and Dooars Tea. When Germany rejected the tea consignments, similar exports were accepted in U.K. leading to the question as to whether Germany practiced the same based on protectionist intents.⁸⁷

Likewise, the EU had banned Indian marine products on SPS grounds in 1997. Despite India acclimatising its system to the EU regime and incurring substantial investments in infrastructure, equipment, running costs, training of personnel at various stages of production and processing, etc, in 2006, the EU rejected the Indian marine consignments containing antibiotics and bacterial inhibitors.⁸⁸ There are around 250 bacterial inhibitors among which only 10 are banned.⁸⁹ However, the EU filed complaints based upon presence of any of these 250 inhibitors, even though they were not specifically banned.⁹⁰ Different EU members offered different reasons for rejection of similar consignments. It was alleged that high yield from the Mediterranean seas, leading to a drop in prices for marine products for EU members like Italy and Spain coincided with the rejection of Indian marine products, suggesting that restrictions

⁸⁵ Chinmay Deshmukh, *Pulp Friction: World Trade Organization Violations in the European Unions' Ban of Indian Fruit Exports*, CORNELL INTERNATIONAL LAW JOURNAL ONLINE, <http://cornellilj.org/wp-content/uploads/2014/09/C.-Deshmukh-EU-Fruit-Ban.pdf>.

⁸⁶ Das, *supra* note 60, at 981-982.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 978.

⁹⁰ *Id.*

were imposed on Indian exports with a view to limit the exports on purpose.⁹¹

3.3 Plausible Reasons for Exports Rejection on SPS Grounds

Reasons for the protectionist use of the SPS Agreement are multi-pronged. One among them is the interpretation offered to 'risk assessment' and 'scientific evidence' by the WTO. In *Japan – Agricultural Products II*,⁹² it was held that there is no need for a rational or objective relationship between scientific evidence and SPS measures. Risk assessment as defined in the SPS Agreement reads as given below:

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.⁹³

The Appellate Body in *Australia – Salmon*⁹⁴ observed that the evaluation of the likelihood of entry, establishment or spread of a pest or disease or evaluation of the potential for adverse effects can be done either qualitatively or quantitatively. Further, there is no need for risk assessment to establish a certain magnitude or threshold level of degree of risk. As far as the second aspect of the definition is concerned, only the 'potential' for adverse effects on human or animal health arising from additives need to be evaluated. The Appellate Body in *EC – Hormones*⁹⁵ confirmed the finding in

⁹¹ *Id.*

⁹² Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/12 (Adopted on March 19, 1999).

⁹³ *Agreement on Sanitary and Phytosanitary Measures*, 1867 U.N.T.S. 493, Clause 4, Annexe A.

⁹⁴ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18 (Adopted on March 20, 2000).

⁹⁵ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/29 (Adopted on February 13, 1998).

Salmon and held that there is no requirement to establish a minimum magnitude or threshold of risk.⁹⁶ This sense of logic employed by the WTO, based on a literal interpretation of the texts, has made it easier for nations to employ SPS measures.

Coupled with the above-mentioned, deficient communication between governments and exporters, lack of infrastructure and expertise in country of export, inadequate storage and transportation facilities, absence of synergized efforts by national agencies to constantly monitor adherence to quality standards, insistence on overly technical standards, complicated and constantly changing food safety standards endorsed in different jurisdictions, etc. pose challenges to Indian exporters.

Developed nations' susceptiveness to lobbying by supermarket chains, reliance on over-complicated and technical standards, agenda to avoid strong competitors in desired sectors, priority given to consumer choices are some of the reasons behind imposition of excruciating SPS standards.⁹⁷ Developed nations also fail to honour the doctrine of equivalence tests by conducting test already done in developing countries for checking food safety thus incurring huge expenses.⁹⁸ For example, Indian exports to EU are already proved to be in compliance with global GAPs and are made to repeat their tests in EU. While laboratory tests are cost Rs. 8000 – 9000, these tests are repeated in EU for Rs.40,000 – 50,000.⁹⁹ This creates huge additional expenses for Indian exporters and deters free trade.

4. Conclusion

The research showcases that India's agriculture and food exports are subjected to inequitable treatment at times on superficial grounds. While discriminatory treatment on grounds of protection of human,

⁹⁶ See, Das, *supra* note 60.

⁹⁷ See, Thomas Reardon et.al., *Links between Supermarkets and Food Prices, Diet Diversity and Food Safety in Developing Countries*, TRADE, FOOD, DIET AND HEALTH: PERSPECTIVES AND POLICY OPTIONS, (Corinna Hawkes, Chantal Blouin et.al eds. 2010).

⁹⁸ Mukherjee, *supra* note 56, at 21

⁹⁹ *Id.*

plant and animal health can be justified, discrimination afforded on superficial grounds are violative of principles of NT. Such violations of NT obligations point towards the inequity persisting in trade. Though summarized in the context of Indian food exports in this article, the situation is not uncommon in connection to other developing countries as well. At the same time, developed countries also have similar grievances against developing countries, including India. The main premise in the case of *India – Agricultural Products*¹⁰⁰ is one such an instance.

It is important to incorporate necessary rectification in cases where tradable items are rejected by the importing country for substantial reasons. At the same time, misuse of the provisions for permeating protectionism cannot be overlooked. It is important that developing countries stay prepared to face tough negotiations in cases where rejections are made on superficial grounds. Only then can trade entail a win-win situation for the parties involved.

The inequity in food trade also exposes instances of the distribution of unsafe food among citizens. Masses in developing countries are exposed to unsafe food and water because of improper governance, lack of adequate facilities with respect to maintenance of food quality standards and lack of awareness. Lack of access to safe food and drinking water has resulted in an increasing number of deaths in third world countries. “Until the domestic market become non-receptive to bad quality produce and strict emphasis is placed on consumer health and food safety standards, India cannot be an exporter of vegetables despite its large production base.”¹⁰¹ The ordinary citizenry needs to be sensitized to maintain zero-tolerance to unsafe food and the global community is bound to come together to make safe and quality food affordable across the globe.

¹⁰⁰ Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/44 (Adopted on June 19, 2015).

¹⁰¹ Mukherjee, *supra* note 70, at 124.